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Truth, with a Small “t”

by
DAVID L. FAIGMAN*

Introduction

This conference is entitled “Truth and Its Rivals.” Yet, many of the presenters, particularly Professors Scallen and Wiethoff, and Professor Taslitz, have approached the Symposium as if it were entitled “Either Truth or Its Rivals.” This reflects a basic misunderstanding of what science has to offer and its relationship to “truth.” Science does not present an alternative paradigm that is incompatible with normative value definition or which otherwise excludes value choices. Nor is science necessarily so infested with normative biases that it usurps value definition by legal decision makers. Science is merely a tool that paints a picture of what, for want of a better term, we call the “real world.” Whether this picture is ultimately accepted by the legal system as “true,” or indeed as relevant at all, depends on values to be found by methods other than scientific.

Sometimes, certainly, legal decision makers must choose between scientific “truth” and some policy value. When this occurs, the question is whether science is even relevant to the legal decision to be made. More typically, however, science incorporates the value orientation as a decision rule regarding belief in some picture of the real world. When this occurs, the question is not whether science is relevant, but rather how relevant it is. This short Comment focuses on two situations: (1) when there is a choice between science and some rival and, the more frequent situation in the evidence context, (2) when science incorporates these so-called rivals as a part of its decision rule.

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I. *Either Truth or Its Rivals*

Occasionally, irrespective of the quality of the research data available, the real question is whether the science is relevant at all. Consider the recent unearthing of the skeleton dubbed "Kennewick Man."¹ In the spring of 1996, heavy rains flooded the Columbia River in Kennewick, Washington, and revealed a long-buried skeleton. Soon after it was discovered by a couple of college students, the skeleton made its way to the basement of Jim Chatters, a forensic anthropologist. With the benefit of radiocarbon testing, Chatters estimated that the skeleton was approximately 9,300 years old. Of further relevance to our story, Chatters determined that the skeleton had Caucasoid features that linked it to regions of Europe and Southern Asia, as opposed to the Northern Asian features shared by Native American tribes. Therefore, Chatters argued, this skeleton might suggest that some of the original settlers of North America were from Southern Asia or Europe, rather than Northern Asia, as long believed by scientists. Intrigued, he sought to study the skeleton further.

Several Native American tribes intervened, however, and called upon the Army Corps of Engineers to return the skeleton to them for proper burial.² The Corps confiscated the skeleton and moved it to a government storage facility until the dispute could be resolved. The tribes claimed rightful sovereignty over the skeleton under a 1990 act, the Native American Graves Protection and Repatriation Act (NAGPRA).³ NAGPRA provides for the repatriation of cultural property to its rightful owners. The Native American tribes claim that the skeleton, if it is indeed 9,300 years old, is part of their cultural ancestry and falls within the provisions of the statute. Chatters and other scientists contend, among other things, that the skeleton is Caucasoid and thus not related to the groups claiming kinship with it.

1. The facts of this story as related here are based on *Asatru Folk Assembly v. United States*, 969 F. Supp. 614 (D. Or. 1997), and several newspaper reports, including M.L. Lyle, *Pagans, Tribes, Scientists Battle over Ancient Bones; Court to Decide Who Holds Claim to Kennewick Man*, WASH. POST, Sept. 10, 1997, at A1; Kim Murphy, *Skeleton Embodies Debate on Americas' First People Ancestors: Scientists, Tribes Spar over Ancient Remains, and Issue of Who Originally Inhabited the New World*, L.A. TIMES, Aug. 13, 1997, at A1.

2. See *Bonnichsen v. United States*, 969 F. Supp. 628 (D. Or. 1997).

3. 25 U.S.C. § 3001-13.

There are thus two competing versions of the "truth" that a court will have to resolve. The scientists argue that the skeleton is the "ultimate elder," and since it predates the Native American tribes' arrival here, it cannot be "repatriated" within the meaning of the statute. The Native American tribes, in contrast, date their existence back more than 10,000 years through their narrative history and thus claim to be the skeleton's heirs. As a Native American spokesperson explained:

From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe our people migrated here from another continent, as the scientists do.

Some scientists say that if this individual is not studied further, we, as Indians, will be destroying evidence of our own history. We already know our history. It is passed on to us through our elders and through our religious practices.⁴

Hence, if the skeleton is 9,300 years old it is, by definition, a Native American ancestor, since they have been here from "the beginning of time."

Kennewick Man appears to present a contemporary version of the great debate between creation and evolution. But the issue is not so simple because of the existence of NAGPRA. NAGPRA, enacted largely to address and remedy the tragedy associated with the pillaging of Native American grave sites in the nineteenth and early twentieth centuries, might be interpreted as requiring deference to Native American sensibilities. In other words, the very relevance of "the truth" might depend entirely on statutory interpretation. Under this view, then, the Native American narrative might prevail not because it is more "accurate" than the scientists' conclusions; it might be chosen because the scientists' truth is not relevant under the pertinent law. Without taking a position on the merits of the dispute, the legal validity of interpreting NAGPRA to require deference to the Native American narrative is certainly a reasonable result.

What would not be reasonable, however, would be for a court to rule in favor of the Native American tribes because it believed their narrative and did not believe the scientists' research. Professors Scallen and Wiethoff appear to embrace the contrary position, apparently believing that a scientist's "narrative" is no better at discov-

4. Karen Brandon, *9,000-Year-Old Skeleton Spurs Legal Battle; Indians Seek to Deny Bone Analysis of Possible Caucasian*, CHI. TRIB., Aug. 31, 1997, at 3.

ering the "real story" than any other. Hence, for them, there is no difference between a court accepting the accuracy of the Native Americans' version of truth or accepting the scientists' conception of truth. All narratives are equal and none should be privileged. For me, the Native Americans' narrative might be privileged here, but it must be based on an explicit value choice, as might be articulated in the pertinent statute. But when it comes to scientific verity, the scientists win easily.

Professor Taslitz would also presumably give the Native American narrative equal standing on the factual question, perhaps even allowing it to be presented more authoritatively in the guise of science. Since the courts are somewhat reluctant to accept narratives over radio-carbon dating, Taslitz might permit clothing the Native American narrative in modern dress, possibly labeling it a "syndrome." This would put it on the same plane as many of the narratives of other groups vying for legal approbation which have gained acceptance by adopting the trappings of science, if not the rigor of the scientific method.

II. Truth and Its Rivals

What has been missing from some of the discussion in this symposium is the fact that truth and science are in no way synonymous, and scientists, especially good social scientists, do not make any claim for Truth, with a capital "T." When scientists study a hypothesis, they accept or reject their hypothesis (actually referred to as the alternative hypothesis) with knowledge that there is a certain amount of error associated with that decision. The question of how much error to accept is a value choice that is built into the scientific process and which ought to be a policy decision. Consider the following simplified example.

One of the most controversial contexts involving science and the law in the last several years has concerned silicone breast implants. Many recipients of these implants contend that they cause or contribute to the development of certain atypical connective tissue disorders.⁵ These contentions are relevant to both the matter of product approval by the Food and Drug Administration (FDA) and to the

5. See generally 2 DAVID L. FAIGMAN ET AL., *Silicone Implants*, in MODERN SCIENTIFIC EVIDENCE § 30-1.0 - 30-1.4 (1997).

tens of thousands of suits claiming damages attributable to silicone.

To determine the seemingly categorical question of whether silicone implants cause atypical connective tissue disorder, scientists must rely on a multitude of studies that can answer the question only imperfectly. For instance, there are numerous clinical reports and a few toxicological studies that indicate a relationship between the implants and disease, as well as sundry epidemiological studies that show a weak association. Simplifying matters considerably, let us assume that the research indicates that a woman with implants has twice the risk of suffering from an autoimmune disorder than a woman without implants. Let us further assume that this is known with a .10 level of confidence. Hence, statistically speaking, we will be wrong 10% of the time if we were to conclude that implants double the risk of autoimmune disorders. Of course, also relevant is the question of what these statistics are based upon. Statistical statements are only as good as the research methods used to gather the data. If, for example, disease reports were based on unverified medical records, we should discount, or even disregard, the higher incidence of the disease among silicone implant recipients. This would be especially true if the studies were conducted after much of the litigation had already begun.

The legal questions presented in this context are manifold: Should courts admit expert testimony regarding the relationship between silicone implants and autoimmune disorders? Should the FDA approve implants for general use? Should it approve them only for reconstructive purposes following cancer surgery? Should they be approved for use if accompanied by a "health warning"?

Obviously, the "truth" regarding silicone and disease is not categorical and must be understood as having components of its rivals built into it. A sophisticated appreciation of science does not ask about truth or some alternative. It asks about truth in light of what is at stake and thus what confidence is needed to choose one course over another. Science cannot tell us specifically whether to ban implants, permit them, or permit them with a warning. That decision is a value choice and should be made explicitly on that basis. But science is instrumental in illuminating the choice.

Perhaps a better title for the symposium would have been "Truth Together With Its Rivals." While science does not exist in a vacuum free of social context, so too the social context cannot exist very clearly without the window provided by science.

